"(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Under petitioner's (plaintiff's) alternative Point II (upon which the Court of Appeals decided this case), the applicable statute is § 2-207 of the Uniform Commercial Code (Ill. Rev. Stat., 1961 [effective July 1, 1962] ch. 26, § 2-207):

"2-207. § 2-207. Additional Terms in Acceptance or Confirmation. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

"(a) the offer expressly limits acceptance to the terms of the offer;

"(b) they materially alter it; or

"(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

"(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementaory terms incorporated under any other provisions of this Act."

STATEMENT OF FACTS.

In April 1962, plaintiff Construction Aggregates Corporation ("CAC"), was the successful bidder on a contract for the construction of dikes enclosing approximately 60 square miles of the Dead Sea in Israel, forming "evaporation pans" to be used to extract minerals from which potash could be produced. In order to construct the evaporation pans, it was necessary to move vast amounts of sand, gravel and rock from a large "borrow pit" to the Dead Sea contract site.

In May and June 1962, CAC representatives commenced discussing the conveyor system with Hewitt-Robins, Incorporated ("H-R"), with CAC exhibiting a proposed conveyor layout to H-R. CAC said that it would obtain some used conveyor equipment for the proposed system.

On May 25, 1962, H-R wrote CAC, offering for CAC's consideration the "basis for a cost-plus contract to design, furnish and provide the necessary erection supervision for the subject earth moving conveyor system" (404 F. 2d 506-7). That letter was written by H-R's Chicago representative after submission to and approval by H-R's contract sales manager in New York (App. 789, 807). It was a detailed letter, covering in separate sections: engineering design; the purchase from H-R of material of H-R manufacture, at regularly published list prices; the furnishing by H-R of structural steel and chutes and other new equipment not normally of H-R manufacture procured from others; the incorporation by H-R into the system of any used conveyor equipment, referring specifically to the Morrison-Knudson equipment which CAC later purchased; times of delivery; and terms of payment (App. 3-8). Upon closing argument, defendant's counsel admitted (Tr. 4048-9):

> "Mr. Eichenberger on May 25 made an offer after getting authority from appropriate officers. . . . He had authority to make that offer. If they had said it is a deal, we accept it, you had a contract."

The opinion below makes no reference to this admission.

A further meeting of representatives of CAC and H-R's Chicago office was had on June 15, 1962. Following an exchange of letters of the same date, to "record" or "confirm" the "understandings" reached at that meeting H-R's representatives, Eichenberger and Holloman testified the "sole point of difference" was whether CAC was obligated to purchase material which H-R manufactured from H-R rather than a competitor, a simple matter of competition prices (App. 809-10, 865-6). After a meeting with Ezra Sensibar, then CAC's vice-president, on June 18, 1962 at which Holloman suggested that the parties "arrive at a predetermined price level" at which CAC would agree to buy products of H-R's manufacture (App. 843-867), Holloman secured authority to quote additional discounts which Ezra Sensibar said "were satisfactory" to him (App. 845-6, 868) and H-R's letter of June 20 was sent out, confirming the "agreements reached" in the Holloman-Sensibar telephone conversations to

> "supply you with all items of Hewitt-Robins manufacture."

at the agreed discounts, and thanking CAC

> "for accepting our proposal" (App. 10-2, 74).

CAC's final letter of June 30, 1962 referred to the earlier letters of May 25, June 15 and June 20, 1962 (App. 14-5) and confirmed that

> "Any new equipment which is required by us and which you regularly manufacture as part of your standard line is to be purchased from you at the price basis given in your letter of June 20."

The Uniform Commercial Code became effective in Illinois at midnight July 1, 1962 (Ill. Rev. Stat., 1961, ch. 26, § 10-101). Section 2-207 of the Code provides:

> "Additional Terms in Acceptance or Confirmation.
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> "(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> "(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

CAC's purchase order, dated and delivered July 3, 1962 (App. 851), contained an express warranty provision which was unacceptable to H-R, which by letter dated July 20, 1962 (and transmitted by Holloman in Chicago to CAC on July 24, 1962; App. 852) predicated acceptance of CAC's purchase order upon disclaimer of express or implied warranties except to repair or replace equipment defective in workmanship or material for a period of one year (App.

18-23). The letter of July 20, 1962 also modified the terms of payment to start "upon presentation of invoice" rather "upon shipment." Lindsey, CAC's treasurer, by telephone requested an extension of the periods of payment, to which H-R agreed by letter dated July 31, 1962 (App. 25-6). CAC made no written response to the letters of July 20 and 31, 1962.

The issues on this petition do not require a restatement of the evidence relating to failure of the conveyor system to operate satisfactorily, but the Court of Appeals characterized the evidence as "sharply disputed."

JURISDICTION BELOW.

Jurisdiction of the court below was based upon admitted diversity of citizenship and the requisite amount in controversy (App. 27, 40). 28 U. S. C. 1332.

ARGUMENT.

I.

IN REJECTING PETITIONER'S CONTENTION THAT AS A MATTER OF LAW A CONTRACT HAD BEEN FORMED ON OR BEFORE JUNE 30, 1962, THE COURT FOLLOWED OUT-MODED CONTRACT LAW RATHER THAN THE MODERN RULE, EXPRESSED IN RESTATEMENT (SECOND) OF THE LAW, CONTRACTS AND SUCH CASES AS V'SOSKE v. BARWICK, 2 CIR. (1968), 404 F. 2d 495.

Hewitt-Robins' initial letter of May 25, 1962 admittedly authorized by Hewitt-Robins' appropriate officials (App. 789, 807) was, admittedly, an "offer" and comes squarely within the Restatement, Second, Contracts § 24:

> "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

When the "sole point of difference" arising from the letters of June 15, 1962—CAC's obligation to purchase new equipment solely from Hewitt-Robins—was resolved by Holloman's quotation of authorized discounts which were "satisfactory" to Sensibar, CAC's vice president, and Hewitt-Robins' letter of June 20, 1962 thanked CAC "for accepting our proposal" contained in the letters of May 25, June 15 and June 20, 1962, there was "acceptance" of that offer by "a manifestation of assent to the terms thereof made by the offeree in a manner invited by the offer" within § 52 of the Restatement. Rather than the out-moded cases cited by the court below, the modern rule, anticipating the Uniform Commercial Code, is expressed

in *V'Soske* v. *Barwick*, 2 Cir. (1968), 404 F. 2d 495, *cert. den.* March 24, 1969:

> "Contract law has progressed and evolved sounder principles since the days of ritualistic and formalistic sealed instrument requirements. Thus, these rules, placing the emphasis on intention rather than form are sensible and reasonable."

As the court there pointed out, the fact that a formal purchase order "was contemplated" does not prevent a binding contract unless "both parties understood that their correspondence was to be of no legal effect or * * * that no obligation should arise until a formal contract was executed" (404 F. 2d at 499). Here, as in *V'Soske* (p. 500):

> "by their correspondence the parties entered into a valid contract"

notwithstanding any subsequent attempt (as by Barwick) to treat the correspondence as mere "negotiations." *V'Soske* must be regarded as a repudiation of *Meyers* v. *Selznick Co.*, 2 Cir. (1966), 373 F. 2d 218, which found its case-law authorities in the 1903 decision in *Rankin*, 189 U. S. 242 and an 1840 decision of Mr. Justice Story.

The conflict between the decision below and the modern, pre-Code Restatement principles and decisions such as *V'Soske* calls for this court's power of supervision.

II.

THE COURT HAS MISCONSTRUED THE UNIFORM COMMERCIAL CODE CONTRARY TO THE STATUTE ITSELF AND THE OFFICIAL COMMENTS.

But if, in any view of the case, the May and June letters do not constitute a complete contract, § 2-207 of the Uniform Commercial Code which, by strange coincidence, became effective at midnight July 1, 1962 (a Sunday) prevents the Hewitt-Robins' letter of July 20, 1962, with

its disclaimers of warranties, from becoming part of the contract, which then must "consist of those terms on which the writings of the parties agree," *i.e.*, the terms of the May and June letters. The contrary holding of the court of appeals is directly contrary to the language of the statute itself and to the intent of the statute as set forth in the Official Comments of its draftsmen.

§ 2-207 of the Commercial Code (Ill. Rev. Stat. 1961, Ch. 26, § 2-207) overrides the pre-code Illinois decisions which required an acceptance must match the terms of an offer precisely. Illinois Code Comment to § 2-207, see Section (1), Ch. 26, p. 149. Under the Code:

> "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> "(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> "(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

The proper construction and application of this and companion sections of the Code, which is now adopted in all states except Louisiana, is a matter of vital importance to the business and commercial world. See Merrill: Uniformly Correct Construction of Uniform Laws, 49 ABA § 545. By this section of the Code, the common law rules of offer and acceptance are, according to the Official Comment, "completely rewritten." The Official Comment continues (Ill. Rev. Stat., ch. 26, § 2.207, at p. 152):

> "1. This section is intended to deal with two typical situations. The one is where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal acknowledgments or memoranda embodying the terms so far as agreed upon and adding terms not discussed."

That is precisely what happened here. CAC's purchase order of July 3, 1962 contained express warranty clauses which were unacceptable to Hewitt-Robins, which in its letter of July 20, 1962 stated (App. 19):

> "We request that the 'QUALITY' and 'WARRANTY' clauses be deleted and replaced by the clause below"

which excluded implied warranties. Since under the Official Comments, such a disclaimer of warranties is a typical clause which "materially alter" any "offer" made by the July 3, 1962 purchase order, such "additional terms"

> "will not be included [as part of the agreement] unless expressly agreed to by the other party."

The court of appeals, citing *Roto-Lith Ltd.* v. *F. P. Bartlett & Co.*, 1 Cir., 297 F. 2d 497, 500, construed the letter of July 20, 1962 as "in effect" an acceptance "expressly made conditional on assent to the additional or different terms" and hence a "counter-offer" which could be accepted orally or by silence or conduct, an "implied condition of acceptance." But such a conclusion is in direct conflict with the

statutory language and again with the Official Comment, par. 6 (Ill. Rev. Stat., ch. 26, § 2-207, p. 153):

> "3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party."

Roto-Lith has been strongly condemned. In the Illinois Code Comment to § 2-207, 1969 Supp., the author states:

> "In *Roto-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 297 F. 2d 497, 500 (1st Cir. 1962), the court held that a response which stated a condition materially altering the offer solely to the disadvantage of the offeror was 'an acceptance * * * expressly * * * conditional on assent to the additional * * * terms' within the meaning of this subsection in the Massachusetts Uniform Commercial Code. This holding is plainly contrary to the literal language of the section and to the intention of the draftsmen. The decision has been the subject of critical comment on this ground. See Braucher, Creditors' Rights Under Uniform Commercial Code, Article 2-Sales, 67 Com. L. J. 218, 219 (1962); Collins, Contracts, N. Y. U. 1962 Ann. Survey of Am. Law 451-54 (1963); Corman, The Law of Sales Under the Uniform Commercial Code, 17 Rutgers L. Rev. 1, 24-25 (1962); Comment, Uniform Commerial Code—Statutory Construction—Additional Terms in Acceptance or Confirmation—*Roto-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 3 B. C. Ind. & Com. L. Rev. 573, 575 (1962); and Comment, UCC Section 2-207 and the 'Counter Offer': Acceptance Unlimited?, 57 Nw. U. L. Rev. 477, 479 (1962).".

In an annotation "Uniform Commercial Code-Sales" 17 ALR 3d 1010, at p. 1056:

> "10. The *Roto-Lith* Case has evoked considerable law review comment. 'The upshot of this case,' concludes the notewriter in 42 BU LR 373, is that as a practical

matter 'the court has written out of section 2-207 (1) the requirement that an acceptance be "expressly made conditional" by seller, in favor of an acceptance impliedly made conditional by the seller's language coupled with buyer's behavior.'

The notewriter in 111 Pa. LR 132 concluded that the court 'did needless violence to the language and scheme of section 2-207.'

The notewriter in 3 BC Ind. & Com. LR 573 stated that an 'intelligent reading' of Code § 2-207 and official comment 3 thereto 'leads to a result diametrically opposite from that reached by the court.'

With apparent agreement, Professor Corman paraphrased the language of the 3 BC Ind. & Com. LR 573 writer, and added that the *Roto-Lith* Case 'is also in conflict with interpretive illustrations as to the scope of § 2-207.' Corman, 'The Law of Sales Under the Uniform Commercial Code,' 17 Rutgers LR 14."

The Michigan court in *American Parts Co., Inc.* v. *American Arbitration Ass'n* (1968), 8 Mich. App. 156, 154 N. W. 2d 5 refused to follow *Roto-Lith* and construed § 2-207 (§ 2207 of the Michigan statute) in accordance with the Official Comments, saying (pp. 14-15):

"Section 2207 seeks to avoid the imposition on businessmen of unagreed terms. Prior to section 2207 terms not agreed upon were often imposed upon one party's performance of an informal agreement following receipt by such party of a document setting forth additional, often boiler plate, terms. The comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute indicate that material additional terms do not become part of the contract 'unless *expressly* agreed to by the other party.' (Reprinted at 19 Stat. Ann. 1964 Rev. § 19.2207, p. 286)

"Under section 2207, a party, except a merchant in the case of an immaterial term, may ignore additional terms, and proceed with performance of the agreement actually negotiated by the parties without fear

that such performance will be interpreted by court or jury as acceptance of the other party's additional terms. The fact that, following an oral agreement, one or both of the parties resorts to what some call the battle of forms, does not, under section 2207, change the agreement or prevent the formation of the contract, or place one party or another in the position of waiving the benefit of the agreement or becoming bound to unagreed small or large print by proceeding with performance of those terms upon which the parties, in fact, did orally agree." (Emphasis is the court's.)

Carrying out its interpretation of *Roto-Lith*, the court of appeals disregards the explicit language of § 2-207(3):

"(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

and of the Official Comment, par. 3 quoted by the Michigan court:

"3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party."

saying:

"CAC can be said to have accepted the terms of H-R's counter-offer.[4] CAC sought a change only in the payment terms of the counter-offer, raising no objection to H-R's other modifications of the original purchase order. H-R granted CAC's requested change in a letter of July 31 and could reasonably have assumed that CAC's single objection was an acquiescence in the remaining terms of the counter-offer. CAC

did not object to this implication in H-R's July 31st letter reference to the terms of its counter-offer."

and in footnote 5:

"[5] Subsequently CAC accepted and paid for H-R's goods and services. The second holding of *Roto-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 297 F. 2d 497, 500 (1st Cir. 1962), is that under the Commercial Code acceptance of goods with knowledge of a counter-offer binds the purchaser to its terms. Whether or not that holding is correct, CAC's treasurer's phonecall of July 31st and H-R's written acceptance of the only changes suggested by CAC are enough to render Section 2-207(3) inapplicable."

But this holding is contrary to paragraphs 6 and 7 of the Official Comments (Ill. Rev. Stat. (1969 Supp.), ch. 26, § 2-207, at p. 16):

"6. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2)."

"7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule."

The only "assumption" which may be made is *objection* to the additional terms, not acquiescence. What is "offer"

or "counteroffer" or "acceptance" is no longer relevant; the terms of the contract are "those on which the *writings* of the *parties* agree." The "second holding" of *Roto-Lith* is nullified by paragraph 7 of the Official Comment, *supra*, which was added in 1966. "CAC's treasurer's telephone call of July 31" is not a *writing* of a party, and Hewitt-Robins' letter of July 31, 1962, changing the terms of payment is not a writing of the *parties*. The holding of the court of appeals is as "plainly contrary to the literal language of the section and to the intent of its draftsmen" as was the holding in *Roto-Lith*.

In his article in 49 ABA Journal 545 above referred to, Professor Merrill stresses the imperative need that the early judicial construction of the Code "be in accordance with the intent of the body which drafted and promulgated it" as set forth in the Official Comments. His statement of the importance of uniform and correct interpretation of the Code is the most powerful argument which we could present why this court—which alone has the power—should grant certiorari to correct the erroneous holdings of *Roto-Lith* and the court below:

> "This need for uniform and correct interpretation and application is imperative, especially with respect to the decisions which the courts in the several states will be called upon to render in litigation arising under the new Uniform Commercial Code. The reasons are numerous. They readily should be apparent to everyone. The Code is of tremendous magnitude, covering all aspects of commercial law. One of the major factors leading to the project for its drafting was the extent of the disharmony in the decisions rendered under the various existing uniform acts on commercial subjects which the Code supplants.[7] The drafting work continued over more than a decade of careful study and meticulous examination.[8] Amendment of the product to cure the effect of errors in construction will be difficult.[9] The Code is well on the way to adop-

tion throughout the United States. Wtih every new adoption, this difficulty of curative amendment will increase. Uniformity of interpretation and application is of the utmost importance to the commercial community. Indeed, it is of transcendent concern to us all, since our well-being is bound up so inextricably with the efficient functioning of the complex machinery of national and international trade.[10] In many areas, the Code deals with aspects of commerce not heretofore subjected to statutory guidance, at least on a uniform basis.[11] For all these reasons, it is imperative that the first decision on each point arising under the Code be in accordance with the intent of the body which drafted and promulgated it. It is of equal importance that subsequent decisions, in the same or in other jurisdictions, be kept in harmony with the original, correct interpretation. This must be the primary aim of every court that is called upon to deal with the Code."

III.

THE ACTION OF THE TRIAL JUDGE IN SENDING THE WRITTEN INSTRUCTIONS TO THE JURY ROOM IN THE ABSENCE OF THE PARTIES AND COUNSEL AND WITHOUT NOTICE TO THEM AND AN OPPORTUNITY TO OBJECT TO SUCH ACTION WAS A DENIAL OF DUE PROCESS OF LAW.

During the conference on instructions the court advised counsel that he never in the Federal Court sent the instructions to the jury room (App. 1571; later both counsel indicated and understood that the instructions would not go to the jury room (App. 1591). When the jury retired after the instructions had been read to them, plaintiff's counsel called the attention of the court to the omission from the instructions agreed upon of the sentence:

> "You must consider these instructions as a whole, not picking out one instruction and disregarding others."

and the court observed (App. 1616):

> "Well that is a good instruction if the instructions are going to the jury room where they can pick them out, but they haven't got anything to pick out. That is a proper instruction where the instructions go to the jury room. I agree with you. It was not used here because they don't go to the jury room."

Upon the return of the verdict, the court advised counsel that he had sent the written instructions to the jury room at the jurors' request (App. 1619). We submit that such communication with the jury during their deliberations was, under the decisions of this court and in other circuits a denial of due process of law.

In *Fillipon* v. *Albion Vein Slate Co.*, 258 U. S. 76, at 81, this court held

> "* * * written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object"

and reversed the judgment and remanded the case for a new trial. In *Shields* v. *United States*, 273 U. S. 583, at 588, this court reiterated the holding and the result in *Fillipon.*

The result below is in conflict with decisions in other circuits. In *Arrington* v. *Robertson*, 2 Cir., 114 F. 2d 821, at 823, the court held:

> "[4] The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given."

Fillipon and *Shields* were followed by the court for the Tenth Circuit in *Parfet* v. *Kansas City Life Ins. Co.*, 10 Cir., 128 F. 2d 362, when the court said:

> "The parties and their attorneys were not present, were not consulted, and did not consent to such communication between the court and the jury. The matter to which the inquiry related had been covered in the instructions of the court, and it may be conceded that the answer was a correct statement of the law. But where a case has been submitted to the jury, and in the course of their deliberations the jury request additional instructions, such instructions should be given in the presence of the parties or their attorneys, or after notice and opportunity to be present. It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

and in *Little* v. *United States*, 10 Cir., 73 F. 2d 861, at 864, where the court said:

> "Nor should there be any communication between the court and jury except in open court. *Fillipon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81."

The Eighth Circuit reached the same result in *Rice* v. *United States*, 8 Cir., 356 F. 2d 709, as did the District of Columbia Circuit in *Jones* v. *United States*, D. C. Cir., 308 F. 2d 307, and the Third Circuit in *Snyder* v. *Lehigh Valley R. R.*, 3 Cir., 245 F. 2d 112. *Walker* v. *United States*, D. C. Cir., 322 F. 2d 434 is not to the contrary; in *Walker* the judge's answer was with respect to codefendants whom the jury acquitted and "the record conclusively shows he suffered no prejudice."

The court of appeals wholly ignored the constitutional question and the cases which we cited, and treated the

issues as if it were merely the failure to admonish the jury to:

> "consider these instructions as a whole, not picking out one instruction and disregarding the others."

But this is not the error complained of; what we object to is the denial of the right to object to giving the jury the opportunity to pick and choose between the instructions, a hazard which both the trial judge and counsel had expressly recognized. The conflict between the rulings and the result below with the decisions of this court and in other circuits clearly calls for the granting of certiorari.

CONCLUSION.

The court below has decided an important question newly arising under the Uniform Commercial Code in a manner contrary to the language of the Code and to the intent of its draftsmen as set forth in the Official Comments, and to the decision of the Michigan court, and has decided a constitutional question in a way in conflict with applicable decisions of this court and the decisions of other courts of appeal. We respectfully submit that certiorari be granted to resolve these conflicts.

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OPINION BELOW.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1968 September Session, 1968

No. 16124

CONSTRUCTION AGGREGATES CORPORATION,
Plaintiff-Appellant,

vs.

HEWITT-ROBINS, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 3, 1968

Before CASTLE, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* This action was brought to recover damages for breach of implied warranties, assertedly arising from a contract to design and furnish a conveyor system. After a month-long jury trial, judgment was entered on the verdict for the defendant, resulting in this appeal.

In April 1962, plaintiff Construction Aggregates Corporation ("CAC"), was the successful bidder on a contract[1]

1. On July 19, 1962, CAC formed a joint venture with Kaiser Engineers and Constructors, Inc. and Macco Corporation to perform this contract. Kaiser and Macco have assigned CAC their interest in the joint venture's claim against defendant.

for the construction of dikes enclosing approximately 60 square miles of the Dead Sea, forming "evaporation pans" to be used to extract minerals from which potash could be produced. In order to construct the evaporation pans, it was necessary to move vast amounts of sand, gravel and rock from a large "borrow pit" to the Dead Sea contract site.

In May and June 1962, CAC representatives commenced discussing the conveyor system with Hewitt-Robins, Incorporated ("H-R"), with CAC exhibiting a proposed conveyor layout to H-R. CAC said that it would obtain some used conveyor equipment for the proposed system.

On May 25, 1962, H-R wrote CAC, offering for CAC's consideration the "basis for a cost-plus contract to design, furnish and provide the necessary erection supervision for the subject earth moving conveyor system."

A few weeks thereafter, CAC and H-R representatives conferred further, resulting in an exchange of letters dated June 15, 1962. CAC's letter said that its understanding was that H-R would "furnish the necessary engineering services," dividing the work between CAC and H-R "as may best suit the needs of the work." CAC's letter also said that it would give H-R preference in the purchase of equipment, but that CAC might purchase used conveyor equipment located in Little Valley, Utah, or other used equipment, to be utilized by H-R "to the greatest extent practicable in the design of the materials handling system."

On the same date, H-R wrote CAC it understood that CAC was accepting H-R's cost-plus letter of May 25, 1962, which was to form the basis of a contract, and stated that H-R would have engineers in CAC's offices within a few days to meet with CAC personnel "to determine the ultimate scheme so that design engineering can start." H-R reported its understanding that it would furnish products

of its own manufacture at prices offered to original equipment manufacturers, without competitive bidding. H-R's letter also solicited a written agreement.

After further negotiations, H-R wrote CAC on June 20, 1962, that it would proceed with the project as a result of telephone agreements reached between certain officers of CAC and H-R and agreed to give additional discounts on its products. The letter thanked CAC for accepting H-R's proposal and concluded that H-R was looking forward to receiving CAC's purchase order, which was supposed to refer to H-R's letters of May 25, June 15 and June 20.

On June 27, 1962, H-R's Melrose Park, Illinois, office advised its New York office that CAC had assigned purchase order No. 16112 for the Dead Sea project, and that when the actual purchase order was received, Melrose Park would send it to New York for acceptance. The memorandum concluded as follows:

> "This contract has been negotiated on the basis of a cost/plus letter written on May 25, 1962, by R. W. Eichenberger. Copies of this cost/plus letter and other pertinent correspondence have been sent to our Legal Department at Stamford for approval. It is not certain at this time whether Construction Aggregates will write their own version of the purchase order or whether they will accept our cost/plus letter. Upon clarification of this matter, it is suggested that the Legal, Contract Administration and Sales Departments get together to insure that we have the necessary terms and conditions included in our contract to minimize our risk and exposure."

On the same date, H-R issued a "contract authority" booking the work in question, although an H-R representative testified that the work would be stopped and the bookings reduced if the contract were not consummated.

On June 30, 1962, CAC sent H-R a letter the purpose of which was "to set forth the final agreement" between the

two companies and asking H-R to send its confirmation to CAC. On July 5, 1962, H-R's Melrose Park office forwarded CAC's purchase order No. 16112, dated July 3, 1962, to its New York office, stating that H-R's representatives had "indicated to C. A. C. that this order is not accepted by H-R until one of our corporate officers approves of all conditions and agreements."

On July 20, 1962, H-R sent CAC the executed acceptance copy of its purchase order No. 16112, but stating that H-R's acceptance was predicated on certain modifications, including a substitute warranty clause providing as follows:

> "This warranty is in lieu of all other warranties expressed or implied.
>
> The Seller warrants that machinery and/or machinery parts to be manufactured by it shall be free from defects in workmanship and material. Such warranty shall be binding upon the Seller for a period of one year from and after delivery of such equipment. If, at any time within such period, it is established to the Seller's satisfaction that any machinery, part or parts manufactured by the Seller were defective at time of delivery, the Seller shall promptly furnish replacements of or repair such items. It is understood that the Seller's liability under this warranty shall be limited to such repair or replacement. Rubber products manufactured by the Seller are not warranted for any specific length of time or measure of service. In the event of failure of such rubber products through defects, the Seller will at its option make replacement or refund, after charging for the service already rendered by the defective products; but in any event, the Seller's liability under this warranty is limited to the refund of the purchase price.
>
> Any parts or equipment which the Seller does not manufacture shall be subject only to the warranties of the Seller's vendors.

> Unless repairs to, alterations of, or work done on said equipment by the Purchaser, shall be specifically authorized in writing by the Seller, any warranty applicable thereto shall become null and void."

The July 20th letter also absolved H-R of liability "for any loss of profits or any indirect or consequential damages." CAC made no written objection to the terms of this letter. But on July 31, 1962, its treasurer telephoned a representative of H-R, requesting a change only in the terms of payment set forth in said letter. These changes were accepted in an H-R letter dated July 31, 1962, referring to the previous letter setting forth H-R's conditions for acceptance. CAC made no objection to this reference or to the other terms H-R had imposed.

On July 31, 1962, CAC purchased three used conveyor systems from the Southern Pacific Company, which were incorporated into the Dead Sea project. Ninety per cent of the electric motors and other electrical equipment used by CAC was second-hand.

CAC commenced the construction of the conveyor system in Israel in late October or early November of 1962. The plant did not operate satisfactorily. In July 1963, at the request of CAC, H-R sent two of its employees to inspect the project and to offer remedial suggestions. Both parties have continued to blame each other for the unsatisfactory working of the system. It is unnecessary for us to affix the blame. However, CAC admitted that by September, 1963, all of its mechanical operation problems were under good control.

CAC tried this case on the theory that H-R was liable for breaches of implied warranties that the conveyor system was fit for the intended purpose, including the engineering design and the component parts. H-R's position was that the jury was entitled to find that its letter of July 20, 1962, limiting warranties and liability for any

breach, was a part of the contract between the parties, so that there was no implied warranty as to either engineering services or parts. The district court permitted the jury to find that H-R's letter of July 20, 1962, constituted a counter-offer that was accepted by CAC, thus justifying a verdict for defendant. We affirm.

CAC first argues that the district court should have decided as a matter of law that a contract had been formed on or before June 30, 1962. The resolution of that question "turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances," so that it was properly referable to the jury. *Rankin* v. *Fidelity Insurance; Trust & Safe Deposit Co.*, 189 U. S. 242, 252-253; 3 Corbin on Contracts (1963), § 554, at pp. 226-227. As Judge Friendly recently put it in *Meyers* v. *Selznick Company*, 373 F. 2d 218, 223 (2d Cir. 1966), the question of the existence of the terms of a contract should be submitted to a jury unless a reasonable man can determine the issue in only one way. When H-R's Melrose Park office received CAC's purchase order, CAC was told that the order would not be accepted until one of H-R's corporate officers approved all the conditions and agreements. On July 20, 1962, H-R wrote CAC about the purchase order and advised that acceptance was "predicated on the following clarifications, additions or modifications to the order," including the substitute warranty clause quoted in the foregoing statement of facts. Since H-R's acceptance was "expressly made conditional on assent to the additional or different terms" contained in its July 20th letter, the exception in the last clause of Section 2-207(1) of the Uniform Commercial Code was clearly applicable.[2] Hence

2. Section 2-207 provides (Ill. Rev. Stats. 1967, ch. 26, § 2-207):

"Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time

the district court was justified in permitting the jury to treat that letter as a counter-offer.[3]

Section 2-207(3) recognizes that the subsequent conduct of the parties can establish a contract for sale. Since CAC's July 3 purchase order and H-R's July 20 counter-offer did not in themselves create a contract, Section 2-207(3) would operate to create one because the subsequent performance by both parties constituted "conduct by both parties which recognizes the existence of a contract." Such a contract by operation of law would consist only of "those terms on which the writings of the parties agree, together with any supplementary terms incorporated under other provisions of this Act." There having

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operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

"(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

3. In effect, the jury could conclude that H-R was plainly telling CAC "I will not accept your offer until you assent to the following: * * *." See *Roth-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 297 F. 2d 497, 500 (1st Cir. 1962). There the court implied a condition of acceptance instead of hewing strictly to the requirement of Section 2-207(1) that conditional acceptance should be expressed in words. See Smith-Hurd Illinois Statutes Annotated, ch. 26, 2-207 (1967 Supp.) p. 15; 57 N. W. U. L. Rev. 477, 479 (1962). But H-R's July 20th letter expressly stated its conditional acceptance of CAC's purchase order, thus satisfying the *Roto-Lith* critics.

been no agreement on the warranty terms, the implied warranties provided in Sections 2-314 and 2-315 (Ill. Rev. Stats. 1967, ch. 26, §§ 2-314 and 2-315) would then ordinarily become applicable. See Hawkland, *A Transactional Guide to the Uniform Commercial Code* (1964) p. 18. Here, however, there is no occasion to create a contract by operation of law in default of further actions by the negotiating parties, for CAC can be said to have accepted the terms of H-R's counter-offer.[4] CAC sought a change only in the payment terms of the counter-offer, raising no objection to H-R's other modifications of the original purchase order. H-R granted CAC's requested change in a letter of July 31 and could reasonably have assumed that CAC's single objection was an acquiescence in the remaining terms of the counter-offer. CAC did not object to this implication in H-R's July 31st letter reference to the terms of its counter-offer and therefore CAC could appropriately be held to the terms of the July 20th letter. Cf. Section 2-201(2) (Ill. Rev. Stats. 1967, ch. 26, § 2-201(2)). In this setting, the jury could determine that CAC had accepted H-R's July 20 terms.[5] See 1 Illinois Practice, Uniform Commercial Code Forms Annotated (Davenport and Henson eds., 1967), p. 55.

As noted earlier, this suit was for breach of implied warranty of fitness for purpose. However, H-R's July 20th letter contained only a limited express warranty and was "in lieu of all other warranties expressed or implied."

4. Hawkland indicates that subsequent negotiations with respect to the terms of the counter-offer may take the contract out of Section 2-207(3). *Id.* at 21.

5. Subsequently CAC accepted and paid for H-R's goods and services. The second holding of *Roto-Lith, Ltd.* v. *F. P. Bartlett & Co.*, 297 F. 2d 497, 500 (1st Cir. 1962), is that under the Commercial Code acceptance of goods with knowledge of a counter-offer binds the purchaser to its terms. Whether or not that holding is correct, CAC's treasurer's phone-call of July 31st and H-R's written acceptance of the only changes suggested by CAC are enough to render Section 2-207(3) inapplicable.

Under the Commercial Code, this was sufficient to exclude implied warranties of fitness. See Ill. Rev. Stats. 1967, ch. 26, § 2-316; see also *L. O. Whybark Co.* v. *Haley*, 37 Ill. App. 2d 22, 184 N. E. 2d 798 (1962, a pre-Code case). Since the general verdict is supportable on the theory that the July 20th H-R letter was binding on CAC and negated implied warranties of fitness, it is unnecessary to discuss CAC's assertions that H-R breached such warranties. In any case, our review of the record convinces us that the jury would have been warranted in resting its verdict, for example, on CAC's failure to install and supervise properly the machinery supplied by H-R, CAC's failure to advise H-R accurately of the nature of the work which the conveyor system was expected to perform, or the inexperienced native work force employed by CAC. We express no views on these questions other than to state that the jury could properly have resolved the sharply disputed testimony on these and other factual questions in favor of H-R.

CAC also contends that it was improper for the district court to send the written instructions to the jury[6] without a cautionary instruction to "consider these instructions as a whole, not picking out one instruction and disregarding the others." Even though it would have been preferable to give such an instruction, we cannot presume that the jury responded to a few instructions and disregarded others. No case has been brought to our attention holding that any possible error in this regard requires reversal under Section 2111 of the Judicial Code (28 U. S. C. § 2111) or Rule 61 of the Federal Rules of Civil Procedure, and the changes that the trial court made in CAC's tendered Instruction No. 1 were too slight to prejudice it.

The judgment of the district court is affirmed.

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6. This practice was sanctioned in *United States* v. *Standard Oil Company*, 316 F. 2d 884, 896 (7th Cir. 1963).